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Racial Employment Picketing: Availability and Extent of Injunctive Relief

I. INTRODUCTION

Picketing of business establishments traditionally has been associated with efforts of organized labor to unionize employees and improve working conditions. In recent years, picketing has been adopted by other groups as a tactic to achieve different objectives.¹ Civil rights organizations, for example, have used picketing to focus public attention on their grievances.² The federal constitution has been held to accord such picketing a wide measure of protection from state interference.³ Nevertheless, courts have enjoined picketing directed at the discriminatory employment practices of particular business establishments on many grounds.

Since the passage of the Civil Rights Act of 1964,⁴ picketing of business establishments has been used with increasing frequency as a means to compel compliance with the equal employment opportunity provisions of the act.⁵ This increase calls for a re-examination of the power of federal and state courts to enjoin racial employment picketing and of the principles governing the issuance of such injunctions. Consideration must also be given to the influence the Civil Rights Act may have on the future development of the law.

II. JURISDICTIONAL LIMITATIONS

Early experience with judicial handling of labor relations demonstrated the need for restraint in granting injunctive relief in cases arising out of labor disputes.⁶ Congress reacted by

1. See 1 TELLER, *LABOR DISPUTES AND COLLECTIVE BARGAINING* § 134 (1940); Annot., 93 A.L.R.2d 1284 (1964).

2. See generally KALVEN, *THE NEGRO AND THE FIRST AMENDMENT* 123-72 (1965); Kamin, *Residential Picketing and the First Amendment*, 61 NW. U.L. REV. 177, 183 (1966); Sibley, *Direct Action and the Struggle for Integration*, 16 HASTINGS L.J. 351 (1965).

3. See, e.g., *Cox v. Louisiana*, 379 U.S. 536 (1965); *Edwards v. South Carolina*, 372 U.S. 229 (1963).

4. 78 Stat. 241, 42 U.S.C. §§ 2000e-2000e-15 (1964).

5. See HUNTER, *INDUSTRIALIZATION AND RACE RELATIONS* 247 (1965). Discussions of the fair employment provisions of the act can be found in Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 BROOKLYN L. REV. 62 (1964); Rosen, *The Law and Racial Discrimination in Employment*, 53 CALIF. L. REV. 729 (1965); 32 U. CHI. L. REV. 430 (1965); 16 W. RES. L. REV. 608 (1965).

6. See generally FRANKFURTER & GREEN, *THE LABOR INJUNCTION* (1930); WITTE, *THE GOVERNMENT IN LABOR DISPUTES* (1932).

withdrawing from the federal courts jurisdiction to restrain or enjoin certain concerted activities arising out of a labor dispute.⁷ Several states followed suit with legislation imposing similar restraints on state courts.⁸ Further restrictions on the jurisdiction of state courts resulted from the pre-emptive effect of federal legislation governing labor-management relations. Because racial employment picketing is often found to be subject to this legislation, these jurisdictional limitations should be explored at the outset.

A. LIMITATIONS UPON THE JURISDICTION OF FEDERAL COURTS—THE NORRIS-LA GUARDIA ACT

The Norris-LaGuardia Act provides that federal courts shall not have jurisdiction to issue injunctions in certain cases "involving or growing out of a labor dispute."⁹ The definition of "labor dispute" contained in the act is expressly not limited to situations involving an employer-employee relationship.¹⁰ The Supreme Court, in *New Negro Alliance v. Sanitary Grocery Co.*,¹¹ found that peaceful picketing by nonemployees aimed at compelling nondiscriminatory employment policies constituted a "labor dispute" and held suits involving such activities to be subject to the anti-injunctive provisions. The public policy declared in the act¹² was found to be equally applicable to assertions of discrimination based on race or color and the more traditional types of labor disputes involving employment conditions, wages, and union affiliation.¹³

7. See Witte, *The Federal Anti-Injunction Act*, 16 MINN. L. REV. 638 (1932).

8. See Aaron, *Labor Injunctions in the State Courts—Part 1: A Survey*, 50 VA. L. REV. 951 (1964); Aaron, *The Labor Injunction Reappraised*, 10 U.C.L.A.L. REV. 292 (1963).

9. Norris-LaGuardia Act §§ 1, 4, 5, 7, 47 Stat. 70 (1932), 29 U.S.C. §§ 101, 104, 105, 107 (1964). See generally Aaron, *Labor Injunctions in the State Courts—Part 1: A Survey*, 50 VA. L. REV. 951 (1964); Aaron, *The Labor Injunction Reappraised*, 10 U.C.L.A.L. REV. 292 (1963); Note, *Jurisdiction of Federal Courts to Enjoin Labor Disputes*, 32 TENN. L. REV. 264 (1965). Congressional authority to limit federal jurisdiction by statute seems clear. See WRIGHT, *FEDERAL COURTS* § 59, at 208 (1963); Note, 67 HARV. L. REV. 836 (1954).

10. Norris-LaGuardia Act § 13(a) (3), 47 Stat. 73 (1932); as amended, 29 U.S.C. § 113(a) (3) (1964).

11. 303 U.S. 552 (1938). See generally 36 MICH. L. REV. 1146 (1938); 11 SO. CALIF. L. REV. 484 (1938).

12. See Norris-LaGuardia Act § 2, 47 Stat. 70 (1932), as amended 29 U.S.C. § 102 (1964).

13. See generally Murray, *The Right to Equal Opportunity in Employment*, 33 CALIF. L. REV. 388, 392-96 (1945); Rosen, *The Law and Racial Discrimination in Employment*, 53 CALIF. L. REV. 729, 764-65 (1965).

The Court recognized, however, that the act allows the federal courts to act in suits involving racial employment disputes to enjoin unlawful acts which will result in an irreparable injury to property where there is no adequate remedy at law and public officers cannot furnish adequate protection.¹⁴ In *Potomac Elec. Power Co. v. Washington Chapter of CORE*,¹⁵ this exception furnished the basis for a federal court injunction restraining a program to encourage customers of a power company to place fair employment stamps on punched cards returned with the payment of their power bills.¹⁶

There may be an additional, judicially created exception to the injunctive prohibitions of the Norris-LaGuardia Act. Some authorities have indicated that the act does not preclude the federal courts from enjoining picketing which is motivated by an unlawful purpose.¹⁷ For example, these authorities would permit the issuance of an injunction to restrain peaceful picketing for an employment policy which is unlawful under the Civil Rights Act of 1964.¹⁸ However, section 4(e) of the Norris-LaGuardia Act denies federal court jurisdiction to enjoin the "giving publicity to the existence of, or the facts involved in any

14. *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552, 562 (1938) (dicta). See Norris-LaGuardia Act § 7, 47 Stat. 71 (1932), 29 U.S.C. § 107 (1964).

15. 210 F. Supp. 418 (D.D.C. 1962).

16. The court expressly did not decide whether the case presented a "labor dispute" within the meaning of the act since the action was enjoined in any event. Nevertheless, the discussion by the court clearly implies that this was not a labor dispute, and the case has been cited as standing for that proposition. See *Ford v. Boeger*, 236 F. Supp. 831, 836-37 (E.D. Mo. 1964).

17. See *Hunt v. Crumbach*, 325 U.S. 821, 831 (1944) (Jackson, J., dissenting); *Order of Ry. Conductors and Brakemen v. Louisville & N.R.R.*, 331 F.2d 368, 369 (5th Cir. 1964) (dicta); *Missouri-Illinois R.R. v. Order of Ry. Conductors and Brakemen*, 322 F.2d 793, 798 (8th Cir. 1963) (dicta). See generally, TELLER, *op. cit. supra* note 1, § 212.

A considerable number of state courts have held that their baby Norris-LaGuardia Acts do not prohibit issuing an injunction when the picketing is for an illegal purpose. *E.g.*, *Fair Share Organization, Inc. v. Mitnick*, 134 Ind. App. 675, 188 N.E.2d 609 (1963) (purpose would violate state fair employment act); see FORKOSCH, *A TREATISE ON LABOR LAW* § 216, at 387 (2d ed. 1965); Annot., 29 A.L.R.2d 323, 360-70 (1953).

18. Cf. *Fair Share Organization, Inc. v. Mitnick*, *supra* note 17. In several cases pickets have made demands that would result in white employees being discharged. See *Id.*; *Green v. Samuelson*, 168 Md. 421, 178 Atl. 109 (1935); *A. S. Beck Shoe Co. v. Johnson*, 153 Misc. 363, 274 N.Y. Supp. 946 (Sup. Ct. 1934). The Civil Rights Act provides that it is an unlawful employment practice for an employer to fail or refuse to hire or to discharge an individual because of his race. 78 Stat. 255, 42 U.S.C. § 2000e-2 (1964). See *Centennial Laundry Co. v. West Side Organization*, 34 Ill. 2d 257, 215 N.E.2d 443 (1966).

labor dispute" unless such activity involves fraud or violence.¹⁹ It does not seem that the unlawful purpose exception can be reconciled with this unambiguous and unqualified statutory prohibition.²⁰

A statutory exception to the anti-injunctive provisions of the Norris-LaGuardia Act was created by the Civil Rights Act of 1964,²¹ which grants jurisdiction to federal courts to enjoin racial employment picketing constituting an "unlawful practice."²² Such picketing is an unlawful practice only if it is an effort by a "labor organization" to cause an employer to discriminate in violation of the fair employment provisions.²³ Significantly, a labor organization is apparently defined in such a manner as to exclude civil rights organizations.²⁴ Thus, the Civil Rights Act allows federal courts jurisdiction to enjoin racial employment picketing only when it is motivated by an unlawful purpose and done by a labor organization. Unless both conditions are satisfied the exemption from the provisions of the Norris-LaGuardia Act is not applicable and the rationale of *New Negro Alliance v. Sanitary Grocery Co.* would be controlling.

B. LIMITATIONS UPON THE JURISDICTION OF STATE COURTS

There are three possible sources of restrictions on the jurisdiction of state courts to enjoin racial employment picketing. The first is the anti-injunction legislation enacted in several states. These enactments were motivated by the same concern for protecting labor activities from indiscriminate interference by the courts that led to enactment of the Norris-LaGuardia

19. Norris-LaGuardia Act § 4(e), 47 Stat. 71 (1932), 29 U.S.C. § 104(e) (1964).

20. Section 4 of the Act has been construed as an absolute prohibition of injunctions in any case falling within its provisions. Thus, any activity protected by § 4 may not be enjoined even if § 7 purports to allow the injunction. See *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938) (act not concerned with background or nature of dispute); *Railroad Trainmen v. Central of Ga. R.R.*, 229 F.2d 901 (5th Cir. 1956); *Wilson & Co. v. Berl*, 105 F.2d 948 (3d Cir. 1939); *Yoerg Brewing Co. v. Brennan*, 59 F. Supp. 625 (D. Minn. 1945); Forkosch, *op. cit. supra* note 17, § 212; Annot., 29 A.L.R.2d 323, 360-70 (1953).

21. Civil Rights Act § 706(h), 78 Stat. 259, 42 U.S.C. § 2000e-5(h) (1964).

22. Civil Rights Act § 706(g), 78 Stat. 259, 42 U.S.C. § 2000e-5(g) (1964).

23. Civil Rights Act § 703(c) (3), 78 Stat. 255, 42 U.S.C. § 2000e-2 (c) (3) (1964).

24. See Civil Rights Act § 701(d), 78 Stat. 253, 42 U.S.C. § 2000e(d) (1964).

Act.²⁵ Secondly, there is the possibility that racial employment disputes may fall within the exclusive jurisdiction of the National Labor Relations Board and thus be pre-empted from state control. Finally, while not a direct jurisdictional limitation, successful removal to a federal court may deprive state courts of power to hear cases of this kind.

1. *Little Norris-LaGuardia Acts*

Seventeen states have little Norris-LaGuardia Acts which prohibit the issuance of injunctions in enumerated cases arising out of labor disputes.²⁶ Since most of these statutes are identical or nearly identical to the Norris-LaGuardia Act, it might be expected that state courts would follow the reasoning of *New Negro Alliance v. Sanitary Grocery Co.* in extending the definition of "labor disputes" to include peaceful racial employment picketing. However, the courts of the only two states which have ruled on the question are in disagreement.²⁷

The Indiana Supreme Court, in *Fair Share Organization, Inc. v. Kroger*,²⁸ held that racial employment picketing constituted a labor dispute under the state's little Norris-LaGuardia Act. Since the definition of labor dispute in the Indiana statute was identical to the definition in the federal act,²⁹ the court

25. See articles cited note 9 *supra*.

26. Conn., Hawaii, Idaho, Ind., La., Md., Mass., Minn., N.J., N.Y., N.D., Ore., Pa., Utah, Wash., Wis., Wyo. However, several other states have legislation restricting to some degree the freedom of a court to issue labor injunctions. See generally Aaron, *Labor Injunctions in the State Courts—Part I: A Survey*, 50 VA. L. REV. 951 (1964).

27. See Annot., 29 A.L.R.2d 323, 358-59 (1953). In the earliest racial employment picketing case, *Green v. Samuelson*, 168 Md. 421, 178 Atl. 109 (1935), the Supreme Court of Maryland upheld an injunction against peaceful picketers who were demanding that white employees be discharged and replaced by Negroes. The court said this was a racial or social dispute, not a labor dispute. However, *Green* has little value as a precedent under the anti-injunction statutes because Maryland's little Norris-LaGuardia Act was not enacted until several weeks after the decision. See MD. LAWS ch. 574, § 76 (1935).

28. 240 Ind. 461, 165 N.E.2d 606 (1960); *accord*, *Fair Share Organization, Inc. v. Mitnick*, 134 Ind. App. 675, 188 N.E.2d 840 (1963). *But see* *Fair Share Organization, Inc. v. Philip Nagdeman & Sons, Inc.*, 135 Ind. App. 610, 193 N.E.2d 257; *cert. denied*, 379 U.S. 818 (1963), where on similar facts the court, in a footnote, doubted that a labor dispute existed. *Id.* n.1, at 615, 193 N.E.2d at 260. The facts are set forth in *State ex rel. Fair Share Organization, Inc. v. Newton* Cir. Ct., 244 Ind. 112, 191 N.E.2d 1 (1963).

29. See IND. ANN. STAT. §§ 40-513(b), (c) (1965). Eight other states define labor dispute in terms identical to the federal act. See CONN. GEN. STAT. ANN. §§ 31-112(b), (c) (1958); MASS. GEN. LAWS ANN.

relied on *New Negro Alliance* in support of its conclusion.

The New York courts are in conflict as to whether racial employment picketing is a labor dispute under the state's little Norris-LaGuardia Act. In *Anora Amusement Corp. v. Doe*,³⁰ a New York supreme court held peaceful picketing by the Negro Youth Association for the purpose of obtaining employment for its own members was not a labor dispute. The court rejected *New Negro Alliance* as inapplicable because, contrary to the federal act, the New York statute did not encompass associations with an "indirect" interest in the disagreement.³¹ The court implied that under its statute a labor dispute exists only when the picketing organization is in the same industry, trade, craft or occupation as the picketed business.³² A similar case, *Lifshitz v. Straughn*,³³ came before an appellate division court two years later. Without citing *Anora Amusement*, the court held there was a labor dispute, relying on *New Negro Alliance*.³⁴ In the latest New York case, *Brandenburg v. Metropolitan Package Store*

ch. 149, §§ 20C(b), (c) (1964); MINN. STAT. §§ 185.18(3), (4) (1965); N.J. STAT. ANN. §§ 2A: 15-58(b), (c) (1952); N.D. CENT. CODE §§ 34-08-01 (1), (2) (1960); ORE. REV. STAT. §§ 662.010 (1), (3) (1965); PA. STAT. ANN. tit. 43, §§ 206(c), (d) (1964); WASH. REV. CODE §§ 49.32.110(2), (3) (1962).

30. 171 Misc. 279, 12 N.Y.S.2d 400 (Sup. Ct. 1939).

31. The Norris-LaGuardia Act provides:

- (a) A case shall be held to involve or to grow out of a labor dispute when the case involves persons . . . in the same industry, trade, craft, or occupation; or have *direct or indirect* interests therein . . . or when the case involves . . . a "labor dispute" (as hereinafter defined) of "persons participating or interested" therein (as hereinafter defined).
- (b) A person or association shall be held to be a person participating or interested . . . if relief is sought against him or it, and if he or it is engaged in the *same* industry, trade, craft, or occupation in which such dispute occurs, or *has a direct or indirect interest therein*
- (c) The term "labor dispute" includes any controversy concerning terms or conditions of employment.

Norris-LaGuardia Act § 13 (a), (b), (c), 47 Stat. 73 (1932), as amended, 29 U.S.C. § 113 (a), (b), (c) (1964) (Emphasis added.). The italicized language was not included in the New York, Maryland, and Louisiana Acts. See LA. REV. STAT. ANN. § 23:821 (1964); MD. ANN. CODE art. 100, § 74 (1964); N.Y. LAB. LAW § 807(10).

32. See, e.g., *Empire Ralph Corp. v. Moving Picture Operators*, 17 Misc. 2d 601, 155 N.Y.S.2d 76 (Sup. Ct. 1956); *Silverglate v. Kirkman*, 171 Misc. 1051, 12 N.Y.S.2d 505 (Sup. Ct. 1939); *Krip Holding Corp. v. Canavan*, 159 Misc. 3, 288 N.Y. Supp. 468 (Sup. Ct. 1936).

33. 261 App. Div. 757, 27 N.Y.S.2d 193 (1941).

34. However, the *Lifshitz* result may be reconcilable with the reasoning of *Anora Amusement* because the organization in question had previously organized employees in the same industry. Furthermore, the organization denied that it sought to represent only Negro employees.

Ass'n,³⁵ a supreme court found that no labor dispute existed when a Negro group picketed liquor stores to coerce greater purchases from Negro salesmen. The *Brandenburg* court cited neither *Anora Amusement* nor *Lifshitz* but relied on a case decided prior to the enactment of the state's little Norris-LaGuardia Act, *A. S. Beck Shoe Corp. v. Johnson*.³⁶

While of doubtful validity under the federal act, the unlawful purpose exception to the anti-injunction statutes is widely recognized under state law.³⁷ In *Fair Share Organization, Inc. v. Mitnick*,³⁸ a civil rights organization peacefully picketed business establishments demanding that Negroes be employed even if white employees had to be discharged. Following the precedent of *Fair Share Organization, Inc. v. Kroger*, the court held that the activities constituted a labor dispute. Nevertheless, the injunction was held proper since the objective of the demonstrators would violate Indiana's fair employment legislation.³⁹

It is submitted that the Supreme Court and Indiana courts have taken the sounder position in holding racial employment picketing to be a labor dispute.⁴⁰ Since the purpose of the Norris-LaGuardia Act is to protect the efforts of employees or prospective employees to secure acceptable terms of employment,⁴¹ the act is properly applicable to protect racial employment picketing from indiscriminate injunctions. This was recognized in *New Negro Alliance v. Sanitary Grocery Co.* by Mr. Justice Roberts when he stated:

The desire for fair and equitable conditions of employment on the part of persons of any race, color, or persuasion, and the removal of discriminations against them by reason of their race or religious beliefs is quite as important to those concerned as fairness and equity in terms and conditions of employment can be to trade or craft unions of any form of labor organization or association.⁴²

35. 29 Misc. 2d 817, 211 N.Y.S.2d 621 (Sup. Ct. 1961).

36. 153 Misc. 363, 274 N.Y. Supp. 946 (Sup. Ct. 1934).

37. See note 17 *supra* and accompanying text.

38. 134 Ind. App. 675, 188 N.E.2d 840 (1963).

39. The court ignored the question of whether § 4 of Indiana's little Norris-LaGuardia Act, which is identical to § 4 of the federal act, precludes such a holding. See IND. ANN. STAT. § 40-504 (1965).

40. Generally the commentators have supported this result. See, e.g., TELLER, *op. cit. supra* note 1, § 136; 23 CORNELL L.Q. 206 (1937). *Contra*, 5 U. CHI. L. REV. 689 (1938).

41. See Norris-LaGuardia Act § 2, 47 Stat. 70 (1932), as amended, 29 U.S.C. § 102 (1964) (policy of the act); Norris-LaGuardia Act § 13(c), 47 Stat. 70 (1932), as amended, 29 U.S.C. § 113(c) (1964) (disputants need not be in employer-employee relationship).

42. 303 U.S. 552, 561 (1938).

The desirability of excepting picketing demanding the implementation of an unlawful employment policy from the anti-injunction acts is subject to question. It must be conceded that one of the purposes of the anti-injunction statutes was to curtail the use of the unlawful purpose doctrine to enjoin peaceful picketing.⁴³ In addition, one should be reluctant to encourage a judicial exception to the statutory language lest later decisions employ the exception to emasculate the statute.⁴⁴ Yet, it seems unjust to compel an employer to choose between violating a fair employment statute or suffering prolonged picketing. Furthermore, most states with little Norris-LaGuardia Acts have long recognized the unlawful purpose exception in dealing with more traditional labor disputes.⁴⁵ Given these considerations, there is no serious objection to enjoining pickets who are demanding that the employer engage in unlawful discriminatory hiring practices.

2. Federal Pre-emption

In general, federal pre-emption in labor law precludes from state regulation conduct arguably protected by section 7 or prohibited by section 8 of the National Labor Relations Act (NLRA).⁴⁶ While it seems clear that racial employment picketing would not arguably be an unfair labor practice under section 8,^{46a} it appears that such picketing is arguably protected by section 7. Section 7 broadly protects the rights of "employees" to engage in concerted activities for mutual aid or protection.⁴⁷ "Employee" has been interpreted as "not only the existing employees of an employer but also, in a generic sense, members of the work-

43. See Annot., 29 A.L.R.2d 323, 360 (1953).

44. The judicial emasculation of the anti-injunction provisions of the Clayton Act, the predecessor of the Norris-LaGuardia Act, can be cited as an example of this danger. See TELLER, *op. cit. supra* note 1, § 194.

45. See Annot., 29 A.L.R. 323, 360-73 (1953).

46. See, e.g., *Hanna Mining Co. v. District 2 Marine Eng'rs Beneficial Ass'n*, 382 U.S. 181 (1965); *San Diego Bldg. Trades Council, Millmen's Union v. Garmon*, 359 U.S. 236 (1959); *Garner v. Teamsters*, 346 U.S. 485 (1953). See generally Updegraff, *Pre-emption, Predictability and Progress in Labor Law*, 17 HASTINGS L.J. 473 (1966).

46a. See *Petition of Curtis*, 240 F. Supp. 475, 482 (E.D. Mo. 1965); *Curtis v. Tozer*, 374 S.W.2d 557, 593-95 (Mo. Ct. App. 1964). The employer's conduct in refusing to hire Negroes has been held not to be an unfair labor practice. See *Ford v. Boeger*, 236 F. Supp. 831 (E.D. Mo. 1964).

47. See National Labor Relations Act § 7, 61 Stat. 137 (1947), as amended, 29 U.S.C. § 157 (1964).

ing class."⁴⁸ Thus, it seems arguable that pickets, engaged in racial employment picketing, seeking to improve employment opportunities for themselves or Negro members of the employee class, are encompassed within this broad definition.

The matter would seem to become more complex, however, if the picketing is for an unlawful purpose, *e.g.*, an employment policy which discriminates in favor of Negroes. It would make no difference that the purpose is illegal under state fair employment legislation,⁴⁹ but a different question would be presented if the purpose is unlawful under the Civil Rights Act of 1964. In the latter case, the picketing should not be considered protected by section 7 of the NLRA.

If this analysis proves correct, most of the present law on racial employment picketing could be disregarded. Racial employment picketing would be protected by federal law unless for a purpose unlawful under federal law. In the latter event, the picketing could be enjoined by state courts and possibly by federal courts.⁵⁰

3. Federal Removal

Because the Norris-LaGuardia Act prohibits federal courts from enjoining racial employment picketing, federal removal may be an effective means of thwarting injunctive relief in many cases brought in state courts. Although one authority has indicated that the removal procedure is readily available to avoid the issuance of an injunction in cases involving racial employment picketing,⁵¹ this area of the law is both complex and unsettled.

The federal removal statute generally allows a defendant to remove from a state court any civil action over which a federal district court would have had original jurisdiction.⁵² Therefore, a case is removable only if it involves the requisite diversity of citizenship between the parties or a federal question.⁵³ Since

48. *John Hancock Mut. Life Ins. Co. v. NLRB*, 191 F.2d 483, 485 (D.C. Cir. 1951).

49. *Cf. Weber v. Anheuser-Busch Brewing Co.*, 348 U.S. 468 (1955).

50. Because of the Norris-LaGuardia Act, federal courts could not enjoin the picketing unless the unlawful purpose doctrine were accepted. See sections II. A and II. B(1) of text, *supra*.

51. See Work, *Injunctive Relief for Economically-Directed Civil Rights Picketing*, 38 *COLO. L. REV.* 516, 519-20 (1966).

52. 28 U.S.C. § 1441(a) (1964).

53. See *WRIGHT, FEDERAL COURTS* § 38 (1963). For the purposes of this discussion it will be assumed the amount in controversy sufficiently

the case can be removed only when no defendant is a citizen of the forum jurisdiction,⁵⁴ racial employment picketing cases will rarely be removable on grounds of diversity of citizenship.

On the other hand, an action to enjoin racial employment picketing would seem to present a federal question if it is alleged that the objective of the picketing would violate the Civil Rights Act of 1964. Specifically, federal question jurisdiction could be based on one of the federal civil rights statutes,⁵⁵ the federal right to obey federal law without interference,⁵⁶ or the standing of certain persons to assert federal rights of a group they are asked to discriminate against.⁵⁷ Of course, the well-advised plaintiff could probably foreclose the possibility of federal removal by not raising a federal question in his complaint.⁵⁸

Even if a federal question or diversity of citizenship is present, removal of a suit to enjoin racial employment picketing, not enjoined under the Civil Rights Act,⁵⁹ may be prevented by the Norris-LaGuardia Act. As previously discussed, the anti-injunction statute provides that federal courts lack *jurisdiction* to issue injunctions in certain cases involving labor disputes. While many courts have construed the statute to deny all jurisdiction over the specified cases,⁶⁰ several courts have held that

meets the jurisdictional prerequisite. See 28 U.S.C. § 1441(a) (1964); 1 BARRON & HOLTZOFF, *FEDERAL PRACTICE AND PROCEDURE* § 104 (1960).

54. 28 U.S.C. § 1441(b) (1964). Corporations are considered citizens both of the state of incorporation and the principal place of business. 28 U.S.C. § 1332(c) (1964).

55. The Civil Rights Act of 1964 allows civil actions to enjoin an unlawful employment practice, and some racial employment picketing may constitute an unlawful employment practice. See notes 21-24 *supra*. See also 28 U.S.C. § 1343 (1964).

56. Cf. *Brewer v. Hoxie School Dist.*, 238 F.2d 91 (8th Cir. 1956); *Bush v. Orleans Parish School Bd.*, 191 F. Supp. 871, 875 n.8 (E.D. La. 1961); *Bush v. Orleans Parish School Bd.*, 190 F. Supp. 861, 866 n.8 (E.D. La. 1960).

57. Cf. *Brewer v. Hoxie School Dist.*, 238 F.2d 91 (8th Cir. 1956). See also *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

58. See *Cue Pub. Co. v. Colgate-Palmolive Co.*, 233 F. Supp. 443 (S.D.N.Y. 1964); *Prensa Grafica Cubana S. A. v. Osle*, 195 F. Supp. 636 (S.D.N.Y. 1961); *J. H. Smith Co. v. Jordan Marsh Co.*, 161 F. Supp. 659 (D. Mass. 1958).

59. The Norris-LaGuardia Act does not apply to suits which are brought within the narrow provisions of the Civil Rights Act. See notes 21-24 *supra*.

60. See *American Dredging Co. v. Local 25, Marine Div., Int'l Union of Operating Eng'rs*, 338 F.2d 837 (3d Cir. 1964); *Dixie Mach. Welding & Metal Works, Inc. v. Marine Eng'rs Beneficial Ass'n*, 243 F. Supp. 489 (E.D. La. 1965); *National Dairy Prods. Corp. v. Heffernan*, 195 F. Supp. 153 (E.D.N.Y. 1961); *Sperry Gyroscope Co. v. Hall*, 185 F. Supp. 64 (S.D.

the statute operates only to deny the court power to grant the injunctive remedy—that *jurisdiction* means only equity jurisdiction.⁶¹ If the court lacks equity jurisdiction only, such cases are removable if all other jurisdictional prerequisites are met. If, on the other hand, the court lacks complete jurisdiction, there is no original jurisdiction in a federal court and, therefore, no possibility of removal.

III. CONSTITUTIONAL LIMITATION ON THE POWER TO ENJOIN PICKETING—DEVELOPMENT OF THE UNLAWFUL PURPOSE DOCTRINE

The foundations of the unlawful purpose doctrine were laid by the Supreme Court in *Giboney v. Empire Storage & Ice Co.*⁶² Peaceful picketing designed to force a supplier to refuse to deal with nonunion peddlers was enjoined by a Missouri court on the ground that the statutory antitrust policy of the state made such refusals to deal illegal. The Court sustained the injunction. After upholding the state's power to make such restraints of trade unlawful, the Court found the objective of the pickets was to compel the employer to do an unlawful act and that there was "clear danger, imminent and immediate, that unless restrained, appellants would succeed in making [Missouri's anti-trust] policy a dead letter."⁶³

Subsequent cases amplified and confirmed the unlawful purpose doctrine. In *Hughes v. Superior Court*,⁶⁴ the Court held that a state may enjoin peaceful picketing designed to compel a violation of judicially adopted policy. *International Bhd. of Teamsters Union v. Hanke*⁶⁵ sustained an injunction against picketing that the state court believed to be contrary to the best interests of the community, although no violation of state law

N.Y. 1960); *Castle & Cooke Terminals, Ltd. v. Local 137, Int'l Longshoremen's Union*, 110 F. Supp. 247 (D. Hawaii 1953).

There have been several recent discussions of construction of the jurisdictional language of the act. See Aaron, *Strikes in Breach of Collective Agreements: Some Unanswered Questions*, 63 COLUM. L. REV. 1027, 1040-51 (1963); 65 COLUM. L. REV. 907 (1965); 78 HARV. L. REV. 1665 (1965); 113 U. PA. L. REV. 1096 (1965); 51 VA. L. REV. 974 (1965).

61. See *Fitchburg Paper Co. v. MacDonald*, 242 F. Supp. 502 (D. Mass. 1965); *Tri-Boro Bagel Co. v. Bakery Drivers Union*, 228 F. Supp. 720 (E.D.N.Y. 1963); *S. E. Overton Co. v. International Bhd. of Teamsters*, 115 F. Supp. 764 (W.D. Mich. 1953); *Pocahontas Terminal Corp. v. Portland Bldg. & Constr. Trade Council*, 93 F. Supp. 217 (D. Me. 1950).

62. 336 U.S. 490 (1949).

63. *Id.* at 503.

64. 339 U.S. 460 (1950).

65. 339 U.S. 470 (1950).

or established judicial policy was involved.⁶⁶ As finally developed, the unlawful purpose doctrine leaves "a broad field in which a State, in enforcing some public policy, whether of its criminal or its civil law, and whether announced by its legislature or its courts, could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy."⁶⁷

Whatever limitation upon the injunctive power of the state courts remains in the unlawful purpose doctrine has been made less effective by the scope of review adopted by the Court in examining the findings of lower courts.⁶⁸ The Court has said that in cases claiming unconstitutionality of state court decrees, it will search the record to determine whether there is a reasonable basis in the evidence for the findings.⁶⁹ But, in fact, this reasonable basis test affords very little control over state court findings of unlawful purpose.⁷⁰ In *Local 10, United Ass'n of Journeymen Plumbers Union v. Graham*,⁷¹ the Court sustained a state court injunction which prohibited picketing for a 100 per cent union job. This was held to constitute an unlawful purpose because the state's right-to-work laws prohibited requiring union membership as a condition of employment. The purpose of the pickets was inferred from the fact that some union men had refused to work on the job. In *International Bhd. of Teamsters Union v. Vogt, Inc.*,⁷² the Court sustained an injunction barring pickets with signs reading: "The men on this job are not 100% affiliated with the A.F.L."⁷³ The Court accepted the state court finding that this picketing was designed to coerce the employer to interfere with his employees' freedom to refuse union membership.

66. One commentator has argued that *Hanke* goes so far as to allow a state court to enjoin *any* picketing not in the "community interest." See Tanenhaus, *Picketing—Free Speech: The Growth of the New Law of Picketing From 1940 to 1952*, 38 CORNELL L.Q. 1, 41 (1952).

67. *International Bhd. of Teamsters Union v. Vogt, Inc.*, 354 U.S. 284, 293 (1957).

68. See generally Note, *Constitutional Protection of Civil Rights Picketing*, 27 OHIO ST. L.J. 361, 367-68 (1966).

69. *Local 10, United Ass'n of Journeymen Plumbers Union v. Graham*, 345 U.S. 192, 197 (1953). See *Cox v. Louisiana*, 379 U.S. 536, 545, n.8 (1965); *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963).

70. This is the basis of Mr. Justice Douglas' dissents in *International Bhd. of Teamsters Union v. Vogt, Inc.*, 354 U.S. 284 (1957), and *Local 10, United Ass'n of Journeymen Plumbers Union v. Graham*, *supra* note 69.

71. 354 U.S. 284 (1957).

72. *Ibid.*

73. *Id.* at 285.

If the test is whether a tenuous thread of reasonableness exists, the requirement of *Giboney* that there be "clear danger, imminent and immediate" has been greatly weakened. As applied in *Vogt* and *Graham*, the test requires only that there be some evidentiary support for the findings made. As Mr. Justice Douglas said in his *Vogt* dissent: "Today, the Court signs the formal surrender of the *Giboney* doctrine. . . ." ⁷⁴

In *Cox v. Louisiana*,⁷⁵ the Court upheld a state statute that prohibited picketing near a courthouse with intent to influence the outcome of a judicial proceeding. The Court carefully examined the reasons why a state may make picketing of a courthouse illegal. It was found that the states are empowered to protect the integrity of their judicial systems from outside influence by whatever means are necessary and appropriate. Because the prohibited conduct raised a substantial possibility that the undesired end would result, the statute was upheld. Such a thorough examination of the state action may indicate the beginning of the return to the unlawful purpose test as laid down in *Giboney*.

IV. STATE COURT INJUNCTIONS AGAINST RACIAL EMPLOYMENT PICKETING

While the Supreme Court struggled with the constitutional status of picketing, state courts used several rationales to justify enjoining racial employment picketing. In states with statutory or judicial policies of nondiscrimination in hiring, the theory commonly utilized was that the purpose of the pickets was to compel hiring on the basis of racial considerations.⁷⁶ In states without such a policy, courts turned to tort law, finding for the employer a right to an unhampered market⁷⁷ and to freedom in

74. *Id.* at 295. Mr. Justice Douglas was joined by Mr. Justice Black and Mr. Chief Justice Warren.

75. 379 U.S. 559 (1965).

76. For a survey of state fair employment laws, see generally B.N.A. STATE FAIR EMPLOYMENT LAWS (1964); Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 BROOKLYN L. REV. 62 (1965); Hill, *Twenty Years of State Fair Employment Practice Commissions: A Critical Analysis With Recommendations*, 14 BUFFALO L. REV. 22 (1964); Pollitt, *Racial Discrimination in Employment: Proposal for Corrective Action*, 13 BUFFALO L. REV. 59 (1963); Rosen, *The Law and Racial Discrimination in Employment*, 53 CALIF. L. REV. 729 (1965).

77. *E.g.*, *In re Curtis*, 240 F. Supp. 475 (E.D. Mo. 1965); *Hughes v. Superior Ct.*, 32 Cal. 2d 850, 198 P.2d 885 (1948), *aff'd*, 339 U.S. 460 (1950); *Centennial Laundry Co. v. West Side Organization*, 34 Ill. 2d 257, 215 N.E.2d 443 (1966); *Fair Share Organization, Inc. v. Mitnick*, 134 Ind. App. 675, 188 N.E.2d 840 (1963); *Brandenburg v. Metropolitan Package Store Ass'n*, 29 Misc. 2d 817, 211 N.Y.S.2d 621 (Sup. Ct. 1961).

hiring whomever he pleases.⁷⁸ Some courts have found additional support for their injunctions in the untruthfulness of the pickets' assertions,⁷⁹ in the notion that society would be damaged by a succession of picketing by every minority group,⁸⁰ and in the availability of alternative avenues or methods of protest to redress grievances.⁸¹

A. PURPOSE TO COMPEL DISCRIMINATORY HIRING

In several states racial employment picketing has been enjoined on the ground that the purpose of the picketing was to compel discriminatory hiring in violation of state fair employment practices legislation or a judicially adopted policy of non-discrimination in hiring.⁸² For example, in *Hughes v. Superior Court*,⁸³ the California Supreme Court sustained an injunction against pickets who were demanding that an employer begin a program of proportional hiring. The court reasoned that such a program would discriminate in favor of Negroes in violation of a judicial policy of fair employment. Following Supreme Court affirmance of this decision,⁸⁴ several other courts adopted this rationale.⁸⁵

A substantial difficulty presented by the application of this unlawful purpose test is the determination of the purpose of the picketing. Generally courts have focused on the language of the placards carried,⁸⁶ but personal statements of purpose made by

78. *NAACP v. Webb's City, Inc.*, 152 So. 2d 179 (Fla. Dist. Ct. App. 1963), *vacated without prejudice*, 376 U.S. 190 (1964), 18 U. MIAMI L. REV. 488 (1964). Cf. *Clemmons v. CORE*, 201 F. Supp. 737 (D. La.), *rev'd on other grounds*, 323 F.2d 54 (5th Cir. 1964).

79. *Young Adults for Progressive Action, Inc. v. B & B Cash Grocery Stores, Inc.*, 151 So. 2d 877 (Fla. Dist. Ct. App. 1963); *Green v. Samuelson*, 168 Md. 421, 178 Atl. 109 (1935).

80. *Hughes v. Superior Ct.*, 32 Cal. 2d 850, 198 P.2d 885 (1948), *aff'd*, 339 U.S. 460 (1950); *Brandenburg v. Metropolitan Package Store Ass'n*, 29 Misc. 2d 817, 211 N.Y.S.2d 621 (Sup. Ct. 1961); *A. S. Beck Shoe Corp. v. Johnson*, 153 Misc. 363, 274 N.Y. Supp. 946 (Sup. Ct. 1934).

81. *NAACP v. Webb's City, Inc.*, 152 So. 2d 179 (Fla. Dist. Ct. App. 1963), *vacated*, 376 U.S. 190 (1964).

82. See cases cited note 77 *supra*.

83. 32 Cal. 2d 850, 198 P.2d 885 (1948), *aff'd*, 339 U.S. 460 (1950).

84. *Hughes v. Superior Ct.*, 339 U.S. 460 (1950). "The California Supreme Court suggested a distinction between picketing to promote discrimination, as here, and picketing against discrimination: 'It may be assumed for the purposes of this decision, without deciding, that if such discrimination exists, picketing to protest it would not be for an unlawful objective.'" *Id.* at 466.

85. See cases cited note 77 *supra*.

86. See, e.g., *Fair Share Organization, Inc. v. Mitnick*, 134 Ind. App. 675, 188 N.E.2d 840 (1963); *Brandenburg v. Metropolitan Package Stores*

members of the picketing group have also been found relevant.⁸⁷ However, the language of the placards and the statements of individuals should not be determinative. Uniformity of purpose and precise language are not characteristic of picketing.⁸⁸ A demand that more Negroes be hired or that a quota of Negroes be hired may or may not indicate a purpose to secure preferential treatment for Negroes. It may merely be a call for the employer to cease his discriminatory hiring practices.⁸⁹

Thus, in determining the purpose of the picketing, the court should place primary emphasis on the conclusions that the employer could reasonably draw from the general tenor of the demands. Moreover, racial employment picketing should be enjoined as motivated by an unlawful purpose only when there is a substantial possibility that the picketing will cause a violation of fair employment policies. Unless such possibility exists, fair employment policies are not materially affected.

Once the purpose of the picketing is determined, its lawfulness or unlawfulness under the fair employment policy is usually clear. If the purpose is to compel the employer to discharge white employees and replace them with Negroes, the unlawfulness is apparent.⁹⁰ At the other extreme, if the pickets are seeking to implement the state policy of fair employment, the purpose should be considered lawful.⁹¹ A demand that Negroes receive preferential treatment in the employer's hiring practices has consistently been held to constitute an unlawful purpose.⁹² The results in these situations seem to follow di-

Ass'n, 29 Misc. 2d 817, 211 N.Y.S.2d 621 (Sup. Ct. 1961); *A. S. Beck Shoe Corp. v. Johnson*, 153 Misc. 363, 274 N.Y. Supp. 946 (Sup. Ct. 1934).

87. See *Fair Share Organization, Inc. v. Mitnick*, *supra* note 86.

88. See, e.g., *Cafeteria Union v. Angelos*, 320 U.S. 293 (1943).

89. See the dissent of Chief Justice (then Justice) Traynor in *Hughes v. Superior Ct.*, 32 Cal. 2d 850, 858, 198 P.2d 885, 895 (1948), *aff'd*, 339 U.S. 460 (1950).

90. See, e.g., *Fair Share Organization, Inc. v. Mitnick*, 134 Ind. App. 675, 188 N.E.2d 840 (1963); *A. S. Beck Shoe Corp. v. Johnson*, 153 Misc. 363, 274 N.Y. Supp. 946 (Sup. Ct. 1934).

91. See, e.g., *San Diego Gas & Elec. Co. v. CORE*, 241 Cal. App. 2d 498, 50 Cal. Rptr. 638 (Ct. App. 1966); *Centennial Laundry Co. v. West Side Organization*, 55 Ill. App. 2d 406, 204 N.E.2d 589, *aff'd*, 34 Ill. 2d 257, 215 N.E.2d 443 (1966).

92. See, e.g., *Ford v. Boeger*, 236 F. Supp. 831 (E.D. Mo. 1964); *Hughes v. Superior Ct.*, 32 Cal. 2d 850, 198 P.2d 885 (1948), *aff'd*, 339 U.S. 460 (1950); *Fair Share Organization, Inc. v. Philip Nagdeman & Sons, Inc.*, 135 Ind. App. 610, 193 N.E.2d 257 (1963), *cert. denied*, 379 U.S. 818 (1964), facts set out in *State ex rel. Fair Share Organization, Inc. v. Newton Cir. Ct.*, 244 Ind. 112, 191 N.E.2d 1 (1963); cases cited note 77 *supra*. No fair employment legislation was involved in *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552 (1938).

rectly from the language of fair employment legislation and the policies embodied therein.⁹³ None can be criticized as a matter of statutory construction.

B. TORT-BASED THEORIES

In states with no legislative or judicial policy of nondiscrimination, the courts have applied tort concepts to racial employment picketing cases.⁹⁴ Unless privileged, picketing which interferes with the plaintiff's economic expectations is tortious and may be restrained by injunction.⁹⁵ Privilege is established by a showing that defendant's conduct will protect or promote an interest superior to that allegedly injured.⁹⁶

In *A. S. Beck Shoe Corp. v. Johnson*⁹⁷ and *Green v. Samuelson*,⁹⁸ picketing designed to secure the employment of a certain percentage of Negroes, even if whites had to be discharged, was held enjoined. The courts found the purpose of the picketing was insufficient to justify direct interference with the employer's business. However, in *Anora Amusement Corp. v. Doe*,⁹⁹ a purpose to obtain more employment for Negroes¹⁰⁰ was held to justify the harm which could be caused others.

Each of these cases appears to have adopted a reasonable balance between the interests of the pickets and the employer. A just result can be reached only if the potential benefit of the picketing is weighed against the extent of the harm which may result to the employer and society. Certainly, the social value of picketing clearly designed to promote discrimination in favor of Negroes is less than that which seeks to end all discriminatory hiring practices.¹⁰¹ It is not unreasonable to conclude that the

93. See Note, 16 W. RES. L. REV. 608, 613-16 (1964).

94. See *NAACP v. Webb's City, Inc.*, 152 So. 2d 179 (Fla. Dist. Ct. App. 1963), *vacated*, 376 U.S. 190 (1964); *Young Adults for Progressive Action, Inc. v. B & B Cash Grocery Stores, Inc.*, 151 So. 2d 877 (Fla. Dist. Ct. App. 1963); *Green v. Samuelson*, 168 Md. 421, 178 Atl. 109 (1935); *Anora Amusement Corp. v. Doe*, 171 Misc. 279, 12 N.Y.S.2d 400 (Sup. Ct. 1939); *A. S. Beck Shoe Corp. v. Johnson*, 153 Misc. 363, 274 N.Y. Supp. 946 (Sup. Ct. 1934).

95. See 1 HARPER & JAMES, TORTS §§ 6.11 at 513, 6.12 at 514, 6.13 at 523 (1956); PROSSER, TORTS §§ 123, 124 (3d ed. 1964).

96. *Ibid.*

97. 153 Misc. 363, 274 N.Y. Supp. 946 (Sup. Ct. 1934).

98. 168 Md. 421, 178 Atl. 109 (1935).

99. 171 Misc. 279, 12 N.Y.S.2d 400 (Sup. Ct. 1939).

100. It is not clear from the opinion whether the pickets were demanding an end to discriminatory hiring practices or discrimination in favor of Negroes. See notes 86-89 *supra* and accompanying text.

101. See 35 COLUM. L. REV. 121-23 (1935); 48 HARV. L. REV. 691-92 (1935); 66 YALE L.J. 397 (1957). *Contra*, 83 U. PA. L. REV. 383-85 (1934).

former activity is enjoined, while the latter activity is not.¹⁰² Even though *Johnson, Green* and *Anora Amusement* all were decided prior to the establishment of the unlawful purpose test as a constitutional limitation upon court injunctive power, neither their result nor their reasoning appears to have been invalidated by the subsequent constitutional development.

A recent Florida decision, *NAACP v. Webb's City, Inc.*,¹⁰³ is more difficult to justify, both jurisprudentially and as a matter of social policy.¹⁰⁴ In that case, the propriety of injunctive relief was determined by balancing the employer's interest in commercial expectations against the pickets' interest "in their social objectives." The court found the pickets' interest outweighed by the injury to the employer's business and held the picketing to be an unlawful interference. From the opinion it appears that the NAACP's purpose may have been no more than to compel the plaintiff to pursue nondiscriminatory employment policies. The court gave no serious consideration to the ultimate purpose of the picketing and the applicability of the privilege doctrine.¹⁰⁵ In addition, the court's undue emphasis on the employer's economic interests would seem to allow all but the most ineffective racial employment picketing to be enjoined.

As a matter of tort law, picketing for nondiscriminatory employment practices should be held privileged.¹⁰⁶ Furthermore, present constitutional limitations upon state court power to

102. *Ibid.*

103. 152 So. 2d 179 (Fla. Dist. Ct. App. 1963), *vacated*, 376 U.S. 190 (1964); *accord*, *Young Adults for Progressive Action, Inc. v. B & B Cash Grocery Stores, Inc.*, 151 So. 2d 877 (Fla. Dist. Ct. App. 1963). The cases are discussed in Note, 17 U. FLA. L. REV. 453 (1964).

104. An extensive criticism of the court's reasoning may be found in 18 U. MIAMI L. REV. 488 (1964).

105. The Florida court may have been under the impression that the privilege doctrine applies only to labor disputes. See *Green v. Samuelson*, 168 Md. 421, 178 Atl. 109 (1935); *A. S. Beck Shoe Corp. v. Johnson*, 153 Misc. 363, 274 N.Y. Supp. 946 (Sup. Ct. 1934). Such an assumption clearly seems inaccurate. See *Hughes v. Superior Ct.*, 186 P.2d 756 (Cal. Ct. App.), *rev'd on other grounds*, 32 Cal. 2d 850, 198 P.2d 885 (1948), *aff'd*, 339 U.S. 460 (1950), and cases discussed therein. See generally PROSSER, TORTS §§ 123, 124 (3d ed. 1964).

106. See *Hughes v. Superior Ct.*, *supra* note 105; *Anora Amusement Corp. v. Doe*, 171 Misc. 279, 12 N.Y.S.2d 400 (Sup. Ct. 1939); 1 TELLER, LABOR DISPUTES AND COLLECTIVE BARGAINING § 136, at 427-28 (1940); RESTATEMENT, TORTS § 767(d), comment e (1932); cf. FORKOSCH, A TREATISE ON LABOR LAW § 194 (2d ed. 1955). See also *San Diego Gas & Elec. Co. v. CORE*, 241 Cal. App. 2d 498, 50 Cal. Rptr. 638 (Ct. App. 1966); *Centennial Laundry Co. v. West Side Organization*, 34 Ill. 2d 257, 215 N.E.2d 443 (1966), where the pickets were allowed to proceed since their goal would not violate the state fair employment policy.

enjoin picketing probably demands such a result.¹⁰⁷ Recent Supreme Court decisions have indicated that an injunction may issue against peaceful picketing only when a serious state interest is endangered;¹⁰⁸ thus, a state may no longer be free to define unlawful purpose so broadly as to prohibit all picketing it finds distasteful.¹⁰⁹

C. SUPPORTING ARGUMENTS

It is generally established that false and misleading assertions by pickets may be enjoined.¹¹⁰ However, the Supreme Court has recognized that preciseness of language has never been one of the virtues of placards, and has held that picketing cannot be prohibited merely because the language used is ambiguous and capable of being construed as untrue.¹¹¹ Thus, "unfair" and "fascist" have been labelled "loose language or undefined slogans that are part of the give-and-take in economic and political controversies."¹¹²

State courts have not demonstrated the same restraint. For example, one court deemed a sign saying "This Store Discriminates Against Negroes" to be untruthful because it was not shown that a Negro had ever been refused a job because of his race.¹¹³ A sign saying "Help Us Fight Communism" was deemed untruthful because there was no evidence that the employer or any member of his family was a member of the Communist Party.¹¹⁴ It would require a fine line to distinguish "discriminates" and "communism" from "unfair" and "fascist." The test applied by this court apparently would permit no more than a sign saying "This store did not hire X, who is a Negro." Such precision cannot be demanded if pickets are to be afforded any protection in presenting generalized grievances and appealing to

107. See 66 YALE L.J. 397, 410 (1957).

108. See *Cox v. Louisiana*, 379 U.S. 536 (1965); *Cox v. Louisiana*, 379 U.S. 559 (1965); *Edwards v. South Carolina*, 372 U.S. 229 (1963).

109. *Ibid.* See Mr. Justice Black's concurring and dissenting opinion in *Cox v. Louisiana*, 379 U.S. 559, 580-81 (1965).

110. See, e.g., *Fair Share Organization, Inc. v. Mitnick*, 134 Ind. App. 675, 188 N.E.2d 840 (1963). Cf. *West Willow Corp. v. Taylor*, 23 Misc. 2d 867, 198 N.Y.S.2d 196 (Sup. Ct.); *appeal dismissed*, 10 App. Div. 2d 1002, 205 N.Y.S.2d 810 (1960); *Individual Retail Food Store Owners Ass'n v. Penn Treaty Food Stores Ass'n*, 33 Pa. D & C 100 (C.P. 1938); *McMorris v. Hudson Sales Corp.*, 233 S.W.2d 938 (Tex. Civ. App. 1950).

111. *Cafeteria Union v. Angelos*, 320 U.S. 293 (1943).

112. *Id.* at 295.

113. *State ex rel. Fair Share Organization, Inc. v. Newton* Cir. Ct., 244 Ind. 112, 191 N.E.2d 1 (1963).

114. *Ibid.*

sympathy.

Some courts have expressed a fear that if Negroes are permitted to engage in racial employment picketing, employers will be subjected to demands by every minority group.¹¹⁵ They argue that such activity should be enjoined before it divides society. However, this argument does not satisfy the constitutional unlawful purpose limitation, and ignores the realities of the position of minority groups in America today. So that persons discriminated against may achieve integration into the fabric of society, avenues of change must remain open.¹¹⁶

One court has suggested that, because other means of achieving the economic and social goals of minority groups are available, picketing may be enjoined.¹¹⁷ Such other means may be other self-help schemes deemed less disruptive or injurious. In many states legislation has provided legal or administrative remedies to resolve disputes arising out of alleged discrimination in employment.¹¹⁸ Finally, federal civil rights legislation has created a procedure ultimately available in most cases of this kind.¹¹⁹ However, notwithstanding the adequacy of other avenues of redress, the argument must fail. Certainly the constitutional unlawful purpose requirement does not permit a state to make all picketing illegal simply because other means are available. Furthermore, there is no indication that either state or federal civil rights legislation was intended to pre-empt self-help attempts to redress discriminatory practices prohibited by its provisions.

As a matter of good social policy, whichever theory is applied the courts should only enjoin racial employment picketing in the clearest cases. The average Negro worker, less educated and less skilled than his white counterpart, is simply unable to compete for employment on a completely equal basis.¹²⁰ There-

115. See *Hughes v. Superior Ct.*, 339 U.S. 460, 464 (1950); *Brandenburg v. Metropolitan Package Stores Ass'n*, 29 Misc. 2d 817, 211 N.Y.S.2d 621 (Sup. Ct. 1961); *A. S. Beck Shoe Corp. v. Johnson*, 153 Misc. 636, 274 N.Y. Supp. 946 (Sup. Ct. 1936).

116. See, e.g., KALVEN, *THE NEGRO AND THE FIRST AMENDMENT* (1965); LERNER, *AMERICA AS A CIVILIZATION*, 85-94, 501-524 (1957); MYRDAL, *AMERICAN DILEMMA* (1944); Note, *The Common-Law and Constitutional Status of Anti-Discrimination Boycotts*, 66 YALE L.J. 397, 410 (1957).

117. See Chancellor's Decree reported in *NAACP v. Webb's City, Inc.*, 152 So. 2d 179, 181 (Fla. Dist. Ct. App. 1963), *vacated*, 376 U.S. 190 (1964).

118. See note 29 *supra*.

119. See Civil Rights Act: §§ 705-06, 78 Stat. 258-59, 42 U.S.C. §§ 2000e-4-5 (1964).

120. See generally Edwards, *Changes in Occupation as They Affect*

fore, to alleviate the highly disproportionate degree of unemployment¹²¹ and the resulting social unrest among Negroes,¹²² it has become necessary for government to encourage industry to find ways to employ more Negroes.¹²³ Surely private groups should not be unnecessarily limited in their attempts to attain the same goals by picketing.

V. RAMIFICATIONS OF THE CIVIL RIGHTS ACT

The Civil Rights Act of 1964 may exert some influence on the availability of injunctive relief against racial employment picketing in the state courts. In those states which have developed an unlawful purpose test from local fair employment policies, the substantive standards will probably remain unchanged since definitions of unlawfulness drawn from the state

the Negro, in ASSURING FREEDOM TO THE FREE 127-31 (Rose ed. 1964); Hill, *Twenty Years of State Fair Employment Practice Commissions: A Critical Analysis With Recommendations*, 14 BUFFALO L. REV. 22-32 (1964); Pollitt, *Racial Discrimination in Employment: Proposals for Corrective Action*, 13 BUFFALO L. REV. 59 (1963).

121. Representative Adam Clayton Powell, citing figures from the Bureau of Labor Statistics, has reported that:

In June of 1965 the unemployment among white people in the United States was 4.1 per cent; the unemployment among black people in the United States was 8.3 per cent.

One year later, in June of 1966, the unemployment of whites had shrunk from 4.1 to 3.5 per cent. But the unemployment of blacks increased from 8.3 to 9 per cent.

A Negro Congressman Talks About "Black Power", U.S. News & World Report, Aug. 15, 1966, pp. 38, 41.

122. "Discrimination in employment . . . has been the predominant target [of mass protests] from the outset. It has been a major motivating factor, even when the declared objective of the demonstrations has been the removal of racial barriers in other areas." NORGREN & HILL, TOWARD FAIR EMPLOYMENT 4 (1964); see Moynihan, *Behind Los Angeles: Jobless Negroes & The Boom*, The Reporter, Sept. 9, 1965, p. 31.

123. The Minneapolis Morning Tribune, Aug. 4, 1966, p. 1A, reported that "Gov. Karl F. Rolvaag and Minneapolis Mayor Arthur Naftalin [after a conference with business leaders] promised 60 jobs for Negroes Wednesday . . . to avert further violence on the city's North Side." See *New Drive to "Fulfill These Rights"*, Business Week, May 28, 1966, p. 38.

Businessmen who cooperate with these programs by engaging in practices which result in a high number of Negro applicants for employment should not be held to be violating the Civil Rights Act. For example, an industry could make it clear that Negroes are welcome, advertise in Negro news media, and submit employment requirements to organizations concerned with securing employment for Negroes. *But see* Civil Rights Act § 704(b), 78 Stat. 257, 42 U.S.C. § 2000e-3(b) (1964). In fact, given the present social circumstances, the courts should be reluctant to hold that even overt discrimination in favor of Negroes violates the act when done in response to the urging of public officials.

and federal legislation usually will be identical.¹²⁴ However, the federal act would appear to create an additional cause of action in these states. In addition to his claim arising under state law, an employer faced with demands that he discriminate in favor of Negroes could also state a claim under federal law by alleging that the purpose of the pickets was made unlawful by the Civil Rights Act. Because any case in which this federal claim is asserted may be removable to a federal court having no power to grant injunctive relief,¹²⁵ this newly created federal right may be useless to a picketed employer and may constitute no more than a procedural trap.¹²⁶

States which have enjoined racial employment picketing on tort principles could accommodate the federal legislation in various ways. Tort rationales could be abandoned in favor of an unlawful purpose test allowing injunctions directed against peaceful racial picketing only when the purpose of the pickets is contrary to the federal act. Under this theory, the employer could state a claim only by raising issues of federal law. However, due to the removal possibility such a theory could effectively eliminate the state remedy.

The same test could be adopted, without raising substantial procedural difficulties, by finding in the civil rights legislation an expression of national policy so compelling that it ought to be judicially recognized as the policy of the state. Under this theory, an employer would state a claim by alleging that the purpose of the picketing violated the judicially adopted fair employment policy as embodied in the federal act. While such a doctrine would probably create a new jurisdictional basis for Su-

124. For example, in *Centennial Laundry Co. v. West Side Organization*, 34 Ill. 2d 257, 215 N.E.2d 443 (1966), picketing for the purpose of ending discriminatory hiring practices was said to be lawful, while picketing demanding quota hiring was said to be for an unlawful purpose since such an employment practice would violate both the federal and state civil rights legislation. There is some legislative history to substantiate this view. See Berg, *Equal Opportunity Under the Civil Rights Act of 1964*, 31 BROOKLYN L. REV. 62, 77 (1964); see also *Hughes v. Superior Ct.*, 339 U.S. 460 (1950).

125. See note 60 *supra*.

126. It is clear that a plaintiff may avoid this trap by stating only the claim arising under local law. *Peterson v. Brotherhood of Locomotive Firemen & Enginemen*, 272 F.2d 115 (7th Cir. 1959); *J. H. Smith Co. v. Jordan Marsh Co.*, 161 F. Supp. 659 (D. Mass. 1958). However, if a federal claim is to be asserted, removal may not be avoided by drafting the complaint without reference to applicable law. *Produce Terminal Realty Corp. v. New York, N.H. & H.R.R.*, 116 F. Supp. 451 (D. Mass. 1953).

preme Court review of the state decision,¹²⁷ there is no suggestion in the decided cases that such a cause of action will support federal question jurisdiction.

The Civil Rights Act will probably have the greatest impact on states that continue to employ tort concepts. Traditionally, these states have determined the propriety of injunctive relief by balancing the goals of the picketing against the rights of the employer to an unhampered market and to the pursuit of any employment policy he desired.¹²⁸ Invariably, the courts found the balance in the businessman's favor.¹²⁹ The Civil Rights Act, however, has altered the interests to be weighed on each side of the balance. The employer is no longer free to follow an employment policy based on racial discrimination.¹³⁰ In addition, pickets demanding an end to discriminatory employment practices are supported by a strong federal policy.¹³¹ The scales now seem clearly tipped in favor of allowing the picketing.

VI. THE SCOPE OF THE INJUNCTION

Since the state has power to enjoin peaceful picketing only when it is protecting some substantial state interest,¹³² it would seem to follow that unless the lawful cannot be separated from the unlawful¹³³ the injunction can be directed constitutionally only against those aspects of the picketing that present a threat to the state interest. Beyond enjoining that conduct the injunction infringes on the freedom of speech of the pickets.

Thus, in *Centennial Laundry Co. v. West Side Organization*¹³⁴ a blanket injunction prohibiting all picketing or distribution of handbills near the plaintiff's company was found to be erroneous. "Activities of defendants which are not unlawful of

127. See note 94 *supra*.

128. See *Standard Oil Co. v. Johnson*, 316 U.S. 481 (1942).

129. See notes 94-100 *supra* and accompanying text.

130. See note 16 *supra*.

131. See 17 FLA. L. REV. 453, 457 (1964). One court has suggested that the Civil Rights Act actively sponsors peaceful protests against discrimination in employment. *Centennial Laundry Co. v. West Side Organization*, 34 Ill. 2d 257, —, 215 N.E.2d 443, 447 (1966).

132. See *Cox v. Louisiana*, 379 U.S. 559 (1965).

133. The court would not have to go to extraordinary lengths to separate the lawful from the unlawful. See *Milk Wagon Drivers Union v. Meadowmoor Dairies, Inc.*, 312 U.S. 287 (1941). *But cf.*, *Cafeteria Union v. Angelos*, 320 U.S. 293 (1943).

134. 55 Ill. App. 2d 406, 204 N.E.2d 589 (1965), *aff'd*, 34 Ill. 2d 257, 215 N.E.2d 443 (1966).

themselves or undertaken for unlawful purposes or which do not lead to violence cannot be enjoined."¹³⁵ Other courts have not so limited their orders. In *NAACP v. Webb's City, Inc.*, the injunction forbade "displaying signs, posters or handbills requesting that members of the public not trade with the plaintiff" and prohibited "picketing the premises of plaintiff"¹³⁶ The *Young Adults* injunction prohibited "maintaining in any manner picket lines at or near plaintiff's business."¹³⁷ These injunctions are consistent with the underlying tort rationale—freedom to employ without regard to race and a right to be free from interference in one's commercial expectations—but cannot be constitutionally justified.

An equity court has the power to fashion a decree so as to eliminate the unlawful aspects of the picketing while permitting those aspects that are lawful. This power was utilized by many courts in the area of labor relations prior to the Norris-LaGuardia Act¹³⁸ and should be applied in cases involving racial employment picketing. It would allow the state to protect its interests and yet would allow the pickets to advance their legitimate economic and social ends.

135. *Id.* at 416, 204 N.E.2d at 594.

136. 152 So.2d 179 (Fla. Dist. Ct. App. 1963), *vacated*, 376 U.S. 190 (1964).

137. *B & B Cash Grocery Stores, Inc. v. Young Adults for Progressive Action, Inc.*, 7 RACE REL. L. REP. 192, 193 (1962), *aff'd*, 151 So. 2d 877 (Fla. Dist. Ct. App. 1963).

138. See, e.g., *Great No. Ry. v. Brosseau*, 286 Fed. 414 (D.N.D. 1923).